FEDERAL ELECTION COMMISSION

WASHINGTON D.C. 20463

STATEMENT OF
COMMISSIONER LEE ANN ELLIOTT
REGARDING ADVISORY OPINION REQUEST
1994-4

In voting against the General Counsel's draft in Advisory Opinion 1994-4, I am told that I've threatened to "render meaningless" a provision of the Federal Election Campaign Act. 1/ Although my powers are not as broad, nor my views as argumentative, as some may allege, I do need to respond to this mischaracterization of my position and voting record on the important issue of defining "member" for purposes of 2 U.S.C. § 441b(b)(4)(c).

By now, this subject needs little introduction. Suffice it to say the Commission has recently tightened its definition of "member" at 11 C.F.R. § 114.1(e) to generally require an individual possess some right to vote for the leadership of a membership association before he or she can hear that organization's political views or be solicited for a contribution to its PAC.

I disagreed with that change, and voted against making this new rule effective and applying it to today's case. 2/ Three of my colleagues tell me, however, that I have "no choice" but to enforce the rule the Commission adopted. Statement at 7. I do not agree. I believe the Commission's new membership rule is unreasonably restrictive and without statutory support, and cannot be constitutionally applied to the Chamber of Commerce.

1. The Issue of "Membership"

The Federal Election Campaign Act ("FECA") of 1971, as amended, governs federal election campaigns by imposing restrictions on political communications, solicitations,

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1/ See Statement for the Record of Vice Chairman McDonald, Commissioner Thomas and Commissioner McGarry to Advisory Opinion Request 1994-4 at page 7 (Oct. 6, 1994)(hereinafter "Statement").

2/ Contrary to the impression left in my colleague's statement, I voted for the complete withdrawal of these rules and voted against making them effective. 58 Fed. Reg. 59641 (Commissioner Elliott dissenting). See notes 14 & 17 infra regarding false assurances about the "liberalization" of the new rules and their effective date.

contributions and expenditures. For example, the FECA only allows membership organizations to make "partisan communications" to, and solicit PAC contributions from, their "members". 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(4)(C). FEC v. National Right to Work Committee, 459 U.S. 197, 202 (1982) ("NRWC")("the effect of this proviso is to limit solicitation by nonprofit corporations to those persons attached in some way to it by its corporate structure.")

A "partisan communication" is the FEC's term for the constitutionally-protected speech a corporation, labor organization or membership association engages in with its "members" about candidates and political issues. See, e.g., United States v. Congress of Industrial Organizations, 335 U.S. 106, 121 (1948); 2 U.S.C. § 431(9)(B)(iii), 11 C.F.R. § 114.3. A "PAC solicitation" is when these organizations solicit these same "members" for political contributions to their separate segregated fund (also called a "PAC") which, in turn, makes contributions to political candidates. Pipefitters v. United States, 407 U.S. 385, 414-417 (1972); Buckley v. Valeo, 424 U.S. 1, 28, n. 31 (1976); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260 (1986) ("It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.").

If an incorporated membership association makes a partisan communication or PAC solicitation beyond its "members," the organization violates 2 U.S.C. § 441b(a) which prohibits any corporation from making an expenditure "in connection with" a federal election. Violations of § 441b(a) are subject to civil penalties up to 200% of the amount in violation. 2 U.S.C. § 437g(a)(6)(C).

The problem is that the FECA does not define the word "membership organization" or "member." 3/ Jordan v. Federal Election Comm'n, No. 91-2428 (D.D.C. May 27, 1994)(slip. op. at 10)(notice of appeal filed, July 25, 1994). For many years the Commission worked with a flexible regulation that defined "member" as "all persons who are currently

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3/ Section 431(9)(B)(iii) only provides, in relevant part, that an "expenditure" does not include "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel." (emphasis added).

Similarly, § 441b(b)(4)(C) only states that the FECA does "not prevent a membership organization, cooperative or corporation without capital stock, or a separate segregated fund established [by such organizations] from soliciting contributions to such a fund from members of such organization." (emphasis added).

satisfying the requirements for membership in a membership organization." 11 C.F.R. § 114.1(e) (1977-1993). 4/ The regulations did not, however, provide any definition for "membership organization."

After the Commission decided it should take no further action in a recent enforcement case involving a membership association, 5/ the Commission determined its member regulation had to be "clarified." This clarification provided a much-needed definition of "membership association" at 114.1(e)(1) 6/, but also tightened the rule to require members not just satisfy the organization's requirements for membership, but also the Commission's requirement that a member pay dues and have a right to vote for a member on the highest governing body. 11 C.F.R. § 114.1(e)(2)(ii). 7/

4/ Former 11 C.F.R. § 114.1(e) provided: "'members' means all persons who are currently satisfying the requirements for membership in a membership organization ... [but] a person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund."

5/ MUR 2804; Aiken v. FEC, No. 92-1864(JLG)(D.D.C. Mar. 30, 1994)(notice of appeal filed Apr. 22, 1994).

6/ "Membership Association" is now defined as a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership such as by sending a membership card or inclusion on a membership newsletter list." 11 C.F.R. § 114.1(e)(1).

7/ "Members" must now meet one of the four tests:
"(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body, or for those who select at least one member of those on the highest governing body of the membership association;
(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association." 11 C.F.R. §114.1(e)(2), or
(iv) on a "case by case" basis for those who do not fit the precise definition of the general rule. 11 C.F.R. § 114.1(e)(2), (3).

I do not contest the Commission's authority to regulate this important question of what constitutes a "member." NRWC at 207 ("we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b"); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 269 (1986)(Rehnquist, J. concurring and dissenting)("the judgment of Congress to regulate corporate political activity was entitled to 'considerable deference.'").

I also recognize the First Amendment's protection of political expression and group association is not absolute, and may be regulated if a sufficiently important state interest has been articulated with carefully drawn rules that avoid unnecessary abridgment of associational rights. See, e.g., NAACP v. Button, 371 U.S. 415 (1963) Buckley v. Valeo, 424 U.S. 1, 25 (1976).

In my opinion, however, the Commission's new regulation goes too far by requiring the average member pay dues and have a right to vote for an organization's highest governing body before he or she can hear that group's political views and be solicited for contributions to it's PAC. This tight standard conflicts with every person's right to voluntarily associate with like minded citizens in private membership organizations, and with the Supreme Court's interpretation of this very statutory provision in the NRWC case.

2. The NRWC Case

In 1982, the Supreme Court unanimously decided a "relatively easy" case involving the National Right to Work Committee's improper solicitation of political contributions from people "insufficiently attached to the corporate structure of NRWC to qualify as 'members' under [§ 441b(b)(4)(C)]." Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 203, 206 (1982)

The NRWC, similar to the Chamber of Commerce, is a nonprofit corporation without capital stock which solicited contributions from its so-called members to a separate segregated fund. Unlike the Chamber, however, the bylaws of NRWC stated that the organization "shall not have members." NRWC at 199. Also unlike the Chamber, NRWC's members played no part in the operation of the association nor were there any membership meetings for them to attend. NRWC at 206.

NRWC found its so-called members by mailing:

> messages to millions of individuals and businesses whose names have found their way onto commercially available mailing lists that the organization has purchased or rented. The letters do not mention membership in the NRWC ... A person who, through his response evidences an intention to support NRWC in promoting voluntary unionism, qualifies as a member. A person who responds without contributing financially is considered a supporting member; a person who responds and also contributes is considered an active member. NRWC sends an acknowledgment and a membership card to both classes. ... In [NRWC's] view, both categories satisfy the membership requirement of § 441b(b)(4)(C).

NRWC at 200, 202-03.

The Supreme Court disagreed, saying NRWC's view:

> would virtually excise from the statute the restriction of solicitation to "members." ... The [view] that NRWC's "members" include anyone who has responded to one of the corporation's essentially random mass mailings would, we think, open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to "members."

NRWC at 203, 204.

In reaching its decision, the Court reviewed the FECA's legislative history, and concluded:

> "members" of nonstock corporations were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. The analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a member under § 441b(b)(4)(C).

NRWC at 204 (emphasis added).

The Court stated it was "entirely permissible for the Commission in this case to look to NRWC's corporate charter under the laws of Virginia and the bylaws adopted in accordance with that charter ... which explicitly disclaimed the existence of members." NRWC at 205, 206. Accord Greenwood Trust Co. v. Commonwealth of Massachusetts, 971 F.2d 818, 828-29 (1st Cir. 1992)

Further, the Court noted NRWC's:

> solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings.

NRWC at 206.

Clearly, the NRWC decision was not about which of NRWC's two classes of members could be solicited under the FECA. It was about whether the NRWC, itself, was a "membership organization" that had any "members" at all. The Court's holding was that NRWC wasn't a proper membership organization that could use § 441b(b)(4)(C) because its bylaws did not provide for members, all of its members lacked rights in the governance of the organization, and that it considered any member of the general public who answered one piece of mail to be a "member" solicitable for political contributions. If NRWC wanted to solicit contributions from the general public, it would have to take the form of a non-connected political committee, and self-finance its solicitations from the political contributions it received, and not from its corporate treasury.

The Court's rationale in NRWC is quite sound. By saying NRWC was not a membership organization, the Court tracked Congress' intent to only allow corporations to use their treasury funds to solicit a limited class of people, and not the general public. But the Commission has misused the NRWC decision to insert itself within otherwise legitimate membership organizations and decide which members are "attached enough" to hear that group's political views. This occurred when the Commission misread its prior opinions and changed the word "or" to "and" in a critical sentence in the Court's decision in NRWC.

3. Commission Precedent on the Issue of Membership

Initially, the Commission followed NRWC's rationale correctly. In 1984, for example, the Commission considered whether the National Rifle Association's solicitation of political contributions from members who could not vote for its board of directors was contrary to the decision in NRWC and in violation of 2 U.S.C. § 441b(b)(4)(C). MUR 1765, Complaint at paras. 4, 6, (Aug. 22, 1984).

The Commission disagreed with the complaint and found no reason to believe a violation had occurred. Our General Counsel noted that the "indicia of membership recognized by the Court in FEC v. NRWC, 103 S. Ct. 552, appear to be present within the NRA organization." Counsel noted a

provision for members in NRA's bylaws; a requirement for an annual meeting; the ability of members to serve on committees, circulate petitions, nominate directors and debate policies; and the organization's use of membership cards, insignias, official journals, and other membership services. MUR 1765, First GC Report at p. 17 (Oct. 15, 1984).

Specifically, the General Counsel concluded that non-voting members of the NRA are still "members" under our Act:

> the record in this matter evidences that all members of the NRA [including non-voting members] have certain other rights vis-a-vis the corporation, NRA. See AO 1977-67. 8/ Of significance is the fact that all members of the NRA are allowed to hold membership on any committee of the NRA which "consider, debate, and recommend policies, strategies, programs, rules and activities to the NRA Board of Directors."

Id. at 15 (footnote added).

Importantly, the General Counsel closed with:

> As discussed above, [NRWC] did not dictate the requirements for membership in a corporation without capital stock, but rather commented upon the various indicia that were lacking in the factual situation under its consideration. The right to vote is only one type of right vis-a-vis the corporation, in this office's view.

Id. at 17. 9/

Accordingly, this Commission had clearly concluded after the NRWC decision that voting rights were not a prerequisite for "membership" under the FECA, and that an individual could demonstrate his "enduring organization attachment" in other ways.

A second example of the Commission correctly applying the NRWC decision is Advisory Opinion 1984-22, the first post-NRWC Opinion on the subject of membership. In it, the Commission was asked whether "regular," "options principal,"

8/ Advisory Opinion 1977-67 held that a Virginia membership organization could solicit its members, even though they lacked any voting rights, because they paid a predetermined minimum amount of dues.

9/ See also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 38-39 n. 19 (1981) ("it is sufficiently clear that the staff report provides the basis for the Commission's action").

"associate," and "allied" members of the American Stock Exchange, Inc., a New York non-profit corporation, could be solicited for contributions under § 441b(b)(4)(C). After noting that "all four classes share equal rights and opportunities to participate in the governance of the Exchange" and that differences existed in voting rights, dues obligations and trading privileges, the Commission rendered the following decision:

Member name	Governance rights	Right to vote	Pays dues	Other privileges	Can be solicited
regular	yes	yes	yes	yes	yes
opt. pncl.	yes	no	yes	yes	yes
associate	yes	no	yes	no	split 10/
allied	yes	no	no	no	no

With the inclusion of "options principal" members within the solicitable class, and the failure to say "associate" members were not solicitable, the Commission was again saying voting rights were not a prerequisite for membership. If voting rights had been mandatory, then only "regular" members would have cleared the hurdle for membership under the FECA.

In reaching this decision, the Commission quoted the NRWC opinion and reviewed our prior decisions:

> In determining if a class of membership has the requisite "enduring" and "independently significant" financial or organizational attachment," the Commission has considered whether such persons have any interests and rights in the organization through some right to participate in the governance of organization and an obligation to help sustain the organization through a regular financial contribution of a predetermined amount. See Advisory Opinions 1982-2, 1979-69, 1977-67 and 1977-17.

Advisory Opinion 1984-22 at 4 (emphasis added, cited Advisory Opinions summarized in footnote below). 11/

10/ The Commission split 3-3 on this particular group, and was therefore unable to determine whether associates are or are not "members" under the FECA.

11/ Advisory Opinion 1982-2 ("active" and "associate" members of a broadcaster's association are "members" even though only "active" members had a right to vote, since both classes pay dues and have governance rights);
Advisory Opinion 1979-69 (associate members of logging association are not "members" since they do "not have the right to vote at any meeting or have any voice

The above use of the word "and" was correct since Advisory Opinion 1984-22 was merely listing various facts the Commission was presented with in the four cited Advisory Opinions. See note 11, supra. "And" was not indicating a two-part test for membership, since none of those four prior opinions required people meet such a test, nor could have they, since we qualified some people as "members" in those Opinions that couldn't have met both halves of the test. 12/

The use of the NRWC decision in MUR 1765 and Advisory Opinion 1984-22 was, in my opinion, exactly right. We properly noted a person could have either a "financial" or an "organizational" attachment to qualify as a member. But after those two cases, the Commission replaced the NRWC rationale with a more demanding, two-part test for membership that requires voting rights. 13/ This metamorphosis

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(Footnote 11 continued from previous page)
in the Association or any control over its officers");
Advisory Opinion 1977-67 (association bylaws stated "no members shall have any voting or property rights" still has "members" under the FECA if they affirmatively express a desire to join, participate in membership surveys and pay a predetermined amount of dues, or have dues waived pursuant to an established policy);
Advisory Opinion 1977-17 ("commodity representatives" were not "members" of a Mercantile Exchange since Exchange's bylaws did not definitively provide for them as members, they had no trading privileges, no right to vote on Exchange rules or elections, nor could they serve as officers or directors of the Exchange).

12/ In fact, Advisory Opinion 1984-22 specifically acknowledged that in Advisory Opinion 1982-2 the:

> Commission concluded that where a membership class of a trade association lacked a right to vote for the officers and directors of the organization, but were eligible to be elected as at-large directors and to serve on the organization's committees and were limited to a defined business group, the class were 'members.'

See also Advisory Opinion 1985-11, p. 3 n. 3 (In Advisory Opinions 1982-2 and 1977-67, "the Commission held that voting rights were not in all cases a mandatory requirement for membership status under the Act.").

13/ See Advisory Opinions 1993-24, 1992-41, 1992-9, 1991-24, 1990-18, 1989-18, 1988-39, 1988-38, 1988-3, 1987-31, 1987-13, 1987-5, 1986-13, 1985-12, 1985-11, 1984-63, and 1984-33.

occurred when the Commission mistook the facts in its previous cases as the law for its future decisions. Instead of finding the common dominator of its prior opinions, the Commission created a "legal lump sum" out of all their facts. By combining every essential fact of every prior opinion into one master test, and by substituting the word "and" where the Supreme Court used the word "or," we created a new standard for membership few people can meet.

For example, instead of following the "has considered" language of 1984-22, Advisory Opinion 1984-63 stated:

> the Commission has required that members have specific obligations to and ... some right to participate in the governance of the organization

(emphasis added). There was, however, no such requirement in any prior Opinion. The next Advisory Opinion re-wrote the past as:

> the Commission has held that for individuals to have the kind of enduring and significant attachment that would qualify them as members, they must have (1) some right to participate in the governance of the organization and (2) an obligation to help sustain the organization through regular financial contributions of a predetermined amount.

Advisory Opinion 1985-11 (emphasis added). That is also not true. Astonishingly, 1985-11 went on to say:

> where an incorporated organization had membership classes who had full or partial voting rights and a class that had no such rights, the Commission stated that such individuals without voting rights were not "members" who could be solicited. See Advisory Opinion 1984-22 and opinions cited therein.

Advisory Opinion 1985-11 at 2.

Advisory Opinion 1984-22, of course, held nothing of the sort, nor did two of the Advisory Opinions it cited (1982-2, and 1977-67). In fact, all three of those opinions held just the opposite: persons were qualified to be members even though they lacked the right to vote.

This revisionism came to a head in Advisory Opinion 1987-31 when a requester challenged the Commission on our standard which essentially replaced the Supreme Court's requirement for a "relatively enduring and independently significant financial or organizational attachment" with our two-part test that a member must "maintain some right to participate in the governance of the organization and some

obligation to help sustain the organization through regular financial contributions." Request for Reconsideration, Advisory Opinion 1987-31 (March 4, 1988).

In defense of its "and" standard, the General Counsel's Office made the following jaw-dropping argument:

> The Supreme Court has also recognized the "trouble with" differentiating between the use of the word "and" and the word "or." De Sylva v. Ballantine, 351 U.S. 570, 573 (1956). In Ballantine, the Court noted that the "word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." Id.
>
> The Court's application of the membership requirement in NRWC indicates that it intended to use a conjunctive rather than disjunctive standard. ... Instead of offering a specific standard, the Court "suggested" that membership required an independently significant financial or organizational attachment. 459 U.S. at 204. To apply this suggested standard, the Court followed the district court, the Commission and the Supreme Court in Hunt [v. Washington Apple Adv. Comm., 432 U.S. 333 (1977)] using the word "or" to convey a conjunctive standard which would have been better expressed with the word "and."

Agenda Document #88-122 Request for Reconsideration of Advisory Opinion 1987-31; Supplement to Agenda Document #88-87 (Nov. 10, 1988).

I find this analysis quite disturbing. First, the Commission never used an "and" test before NRWC. Second, the Supreme Court never cited, let alone "followed," the district court decision, any previous Commission decision, or the Hunt case in its entire unanimous opinion in NRWC. Third, the "and/or" issue in Ballantine concerned the use of the word "or" within a section of the Copyright Act; that case is a lesson in statutory construction and not a tip from the Supreme Court on how to read (or re-write) its opinions. Fourth, and most importantly, the Supreme Court had just repeated its "or" test in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 264 n. 13 (1986)("National Right to Work Committee requires that 'members' have either a 'financial or organizational' attachment."), indicating that it meant what it said.

I have no reason to think the Supreme Court meant "and" when it said "or." Nor do I think the FEC is well-served by revising the past or rewriting judicial opinions. Yet, we decided to codify our errors into new rules on membership.

4. New Rules On Membership

On October 8, 1992, the Commission published a Notice of Proposed Rulemaking stating that it would be replacing its membership rules with new ones allegedly designed to reflect the Supreme Court's 10 year-old decision in NRWC and our Advisory Opinions on the subject. 57 Fed. Reg. 46348.

Many commenters urged the Commission to reconsider its two-part "and" test and return to the Supreme Court's disjunctive language. Nevertheless, the Commission adopted 14/ new membership rules that "require both a financial and an organizational attachment in most instances, to qualify for membership status." 11 C.F.R. § 114.1(e)(2)(ii). Agenda Document #93-49 Proposed Revisions to Definition of Member, at p. 4 (June 1, 1993). 15/

14/ My colleagues make much of the fact that I voted for the final rules and Explanation and Justification. Concurring Opinion of Commissioners Thomas, McDonald and McGarry to Advisory Opinion 1993-24, n. 1 (April 4, 1994)(hereinafter "Concurrence"); Statement at n. 1. What they fail to note, however, is that I later voted for withdrawing these rules and voted against making them effective. See FEC Minutes of an Open Meeting, p. 8, 10 (November 4, 1993). I did this for precisely the reason the Commission now finds itself in: with rules that are final, effective and yielding absurd results right before an election.

During consideration of the final rules and E&J, I voiced strong doubts about whether these rules were truly a "liberalization" of our current policy, as our counsel repeatedly alleged. Also, I stated a preference for delaying the rules to give organizations time to adjust. Several of my colleagues agreed with me, but assured me the final rules were quite permissive and that it was "premature" to decide on delaying the effective date. When the effective date was presented, however, the Commission decided to impose the rules immediately (Commissioner Elliott dissenting). When the new rules were applied to the NRA and Chamber, the talk of liberalization turned out to be a siren song!

15/ As noted in footnote six, members have four ways to qualify under the new rules: either by a significant financial tie, a combination of dues and voting rights, by having significant voting rights, or on a case-by-case basis. 11 C.F.R. § 114.1(e)(2)(i), (ii), (iii) and (e)(3). But the E&J clearly states "the Commission's experience has been that most organizations do not meet the 'significant' test for either [the first or third] tie" and the Commission anticipates that most members

The Explanation and Justification contains some interesting revisions to Commission history. For example, the E&J states:

> The Commission considers the NRWC decision to have overruled prior Advisory Opinions that were inconsistent with its holding.

Explanation and Justification, 58 Fed. Reg. 45772.

None of the 18 opinions issued after NRWC, however, said that a pre-NRWC opinion had been overruled. In fact, the Commission has cited and relied on pre-NRWC Advisory Opinions in post-NRWC Advisory Opinions: most notably in Advisory Opinion 1984-22 which approvingly cited numerous pre-NRWC Advisory Opinions.

In yet another twist, the E&J tries to show how "liberal" the new rules are by stating:

> However, several Advisory Opinions issued following [the NRWC] decision, including Advisory Opinion ... 1984-22, have explicitly or implicitly required more substantial voting rights than those required by these revised rules. Any such Advisory Opinion is overruled to the extent it requires more extensive voting rights than those contained in ... 114.1(e)(2).

Id.

That is clearly wrong. It is impossible to overrule Advisory Opinion 1984-22 on the basis that it "required more substantial voting rights than those required by the revised rules." That is because the Commission found certain people in 1984-22 to be members who had no voting rights at all. 16/

In other words, voting rights are now the sine qua non of membership. As stated in the E&J:

(Footnote 15 continued from previous page)
will have to qualify under the "and" test of subsection (ii). Agenda Document #93-67 Explanation and Justification of the Revised Rules Defining "Member" p. 9-10 (Aug. 12, 1993). 58 Fed. Reg. 45771.

16/ Some may respond to this argument that Advisory Opinion 1984-22 is over-ruled because it involved a stock exchange whose members would now be solicitable under subsection (e)(2)(i). This counter-argument heaps revisionism on revisionism. Nowhere in that opinion was any "significant investment" attachment discussed, nor does the E&J state that is why it is being overruled.

> the Commission believes that some voting rights are mandated by the Supreme Court's NRWC decision, as interpreted in a number of Advisory Opinions ...

58 Fed. Reg. 45774.

Also, voting rights are still required in any case-by-case review of members not meeting any of the three precise definitions of "member." As the Commission explained, § 114.1(e)(3) gives some flexibility in this rulemaking, but any "case-by-case" members will still have to "hold some voting rights in the association." 58 Fed. Reg. 45773.

Many commenters suggested the Commission's insistence on voting rights was inconsistent with the Supreme Court's and the legislative history's analogy to shareholders, since "not all owners of one share of a corporation's stock are allowed to vote on corporate matters." 58 Fed. Reg. 45772. The Commission dismissed this argument because:

> the FECA expressly authorizes corporations to solicit contributions of their PAC's from their shareholders. 2 U.S.C. § 441b(b)(4)(B).

Id.

But the FECA also expressly authorizes membership organizations to solicit contributions from their members. 2 U.S.C. § 441b(b)(4)(C). That's no distinction, that is a direct similarity! Also, despite the Supreme Court's analogy of stockholders to members, the E&J states:

> stock ownership differs significantly from the interests involved in this rulemaking. The ownership of even one share of stock provides a direct financial stake and continuous equity interest in the company.

Id.

In my opinion, the Commission has ruined the Court's and Congress' analogy to stockholders by overemphasizing a stockholder's equity interest. The Commission fails to note that its own regulations allow stockholders to be solicited even if they own non-voting stock. 11 C.F.R. §§ 100.8(b)(4)(ii); 114.1(h). Our regulations therefore create this absurd result: a person can be given a one-dollar share of non-voting stock in a corporation and be solicited the next day for a $5,000 PAC contribution, but that same person who has chosen to join a membership organization and paid thousands of dollars in dues over many years cannot hear that group's political views or be solicited if they have a PAC. This is hardly logical.

5. Application of the New Rules to the NRA and Chamber

In the first application of the new rules, a majority of the Commission reversed the Commission's decision in MUR 1765 and held that 2 million non-voting members of the NRA were no longer "members" under the FECA because they could not meet any of the tests in our new regulations. Advisory Opinion 1993-24. Then in Advisory Opinion 1994-4, the Commission split on the General Counsel's recommendation that under the new rules, the 200,000 member Chamber of Commerce only has 63 "real" members. 17/

I disagreed with these decisions and voted against both Opinions. The significant organizational or financial attachments of the NRA's non-voting members, and the Chamber's membership at-large, have been thoroughly discussed in those Opinions and need not be re-argued here. 18/ What does need to be recounted, however, is the rationale the Commission employed to deny membership to these people.

The overriding theme of the NRA and Chamber Advisory Opinions discussion were: the rules have changed, the Commission has changed, so these groups should change as well. Even though the statute hasn't changed, both organizations could solve their "problem" by reforming themselves, and entrusting their members with the right to vote for at least one person on their respective governing body. Concurrence at 7, 8; Statement at 7.

17/ Since nearly 2 and a half million people have already lost their membership rights under the new rules, its humorous to note we were lead to believe these new, tougher rules would be "a substantial liberalization of the former rules," and that "the standard announced in the new rules is substantially more liberal than that which has been approved by the Commission since NRWC," and that "voting rights have been made as non-burdensome as possible in the final rule." Agenda Document 93-93 Announcement of Effective Date, page 2 (Nov. 1, 1993); Agenda Document 93-90 Letter Requesting Withdrawal of the "Member" Rules p. 1 (Oct. 22, 1993); Concurrence 1-3; Statement, n. 6.

18/ In Advisory Opinion 1993-24, the majority admits that the membership rights of NRA members have not changed since the Commission's decision in MUR 1765. For a fuller discussion of NRA's non-voting members in MUR 1765 and Advisory Opinion 1993-24 see Dissenting Opinion of Commissioner Elliott to Advisory Opinion 1993-24. For an excellent discussion of the Chamber's membership structure, see Statement for the Record of Commissioners Aikens and Potter to Advisory Opinion request 1994-4, p. 5-6 (Oct. 25, 1994).

I hardly think the fate of § 441b's prohibition against corporate expenditures in connection with federal elections hangs on whether a long-time member of the NRA gets to vote for one member of NRA's 75-person board. Nor do I believe the Chamber's members, who already play a significant role in the management of that organization, can only be distinguished from the general public if they can elect one person to its 50-member board. Such a voting requirement just doesn't seem to add anything for purposes of campaign finance law. 19/

Three of my colleagues disagree, and say "the Commission should not write its rules at section 114.1(e)(2) to accommodate those private membership associations who have not 'democratized'." Concurrence at 8. I don't believe it is a legitimate role for an election commission to restructure private organizations, segregate their memberships and prevent some from hearing the views of an organization they voluntarily join. If a membership organization is properly constituted as such under state law, has by-laws that call for members, and gives those members financial or organizational responsibilities within the organization, then those people should be "members" for purposes of our Act.

I also disagree with my other two colleagues who feel that the case-by-case "savings clause" of § 114.1(e)(3) allows the Commission to find membership for the Chamber in today's case. Statement for the Record of Commissioners Aikens & Potter at 2-3, 7. Their argument is foreclosed by the language of the regulation, its Explanation & Justification and Advisory Opinion 1993-24, all of which clearly state that voting rights are still necessary to attain membership via the case-by-case approach of § 114.1(e)(3). Accord, Elliott Dissent to 1993-24 at 16, Statement at 3-6.

6. Conclusion

I completely agree with my colleagues that the "exceptions allowing for [member] organization federal campaign activity are not open-ended." Concurrence at 4. Simply put, by assuming the corporate form, large non-profit organizations must be regulated by § 441b.

19/ Giving every member a right to vote, however, may have a serious impact on association law. Many state's non-profit association statutes provide for non-voting members. In some cases if a member has a right to vote, he also has a right to use the organization's membership list. To protect against infiltration by ideological opponents (like what happened in Jordan v. FEC, slip. op. at 3), I can understand why private organizations want to zealously protect their lists.

I also agree that "there are definite limits to how liberally the Commission may construe the term 'member'." Concurrence at 3. But I want my colleagues to also believe there are limits to how narrowly we can construe that term as well. In my opinion, the voluntary nature of joining (and leaving!) a membership association certainly reduces any alleged coercive element in its PAC solicitations. FEC v. National Conservative PAC, 470 U.S. 480, 499 (1985). And unlike for-profit corporations, the treasury of a membership association is a rough measure of its popular support. This means the regulations we adopt to enforce § 441b(b)(4)(C) must have some appreciation for the First Amendment, the statute, its legislative history and judicial precedent.

Contrary to the allegations, I'm not advocating the abandonment of § 441b or the abuse of soft money in federal elections. Quite the opposite, my position is in closest harmony with the statute and the Supreme Court, and stops the Commission's absurdity that the entire United States Chamber of Commerce has only 63 members.

As Judge Kaufman prophesied about the FEC 14 years ago:

> Officials can misuse even the most benign regulation of political expression to harass those who oppose them. ... This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as potential "evil" to be tamed, muzzled or sterilized. ... The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees.

CLITRIM at 54-55 (Kaufman, J., concurring).

For these reasons, I declined to approve draft Advisory Opinion 1994-4.

October 26, 1994

Lee Ann Elliott
Commissioner